(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

Date: MAY 28 2013 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an IT consulting and development company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, certified by the United States Department of Labor (DOL). Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the ETA Form 9089. Specifically, the director found that since the beneficiary did not have the required 5 years "of post-baccalaureate work experience in the job offered or in one requiring the same skills and abilities," he would need "to qualify as a member of the professions having an advanced degree" as a result of his education alone, and that the beneficiary did not hold the U.S. equivalent of a master's degree. The director denied the petition accordingly.

On appeal, neither the statement from counsel, nor from , a Senior Paralegal at counsel's firm, contest the director's finding regarding the beneficiary's lack of 5 years of post-baccalaureate experience. Therefore, the petitioner has abandoned those claims. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *see also Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

I. ELIGIBILITY FOR THE CLASSIFICATION SOUGHT

As noted above, the DOL certified the ETA Form 9089 in this matter. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

None of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. Federal courts have recognized the scope of

DOL's role in reviewing the ETA Form 9089. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

On appeal, asserts that the director erred as a result of "the unsupported conclusion that in order to have the equivalent of a U.S. master's degree, one must first have the equivalent of a U.S. bachelor's degree." When considering the classification sought, however, the relevant Senate committee stated:

> Amended section 203(b)(2) refers to members of the professions holding "advanced degrees." The committee intends that an advanced degree be a degree received which requires initial completion of a 4-year course of undergraduate study, followed by at least one academic year of graduate study, and which is normally referred to as a master's degree.

S. Rep. No. 101-55, at 20 (1989).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree. 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991).

further asserts that the director erred by failing to address an evaluator's concerns with the database the director accessed. The director, however, did respond to those concerns. The AAO will consider all of the evidence of record, including that incorporated by the director by reference.

The required education, training, experience, and special requirements for the offered position are set forth at Part H of the ETA Form 9089. Here, Part H shows that the position requires a master's degree, or foreign educational equivalent, in any engineering/electronics major and 36 months of experience in the job offered or any occupation providing the required skills and abilities. The petitioner will also accept a bachelor's degree and five years of work experience. However, as previously discussed, the director found that the beneficiary did not have five years of documented work experience as of the date of filing, and counsel does not contest this on appeal.

The beneficiary set forth his credentials on the ETA Form 9089 and signed his name, under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the ETA Form 9089 eliciting information of the beneficiary's education, and elsewhere in the record, he states that he received a Master of Science degree in applied electronics from the and a Bachelor of Science degree from both in India. The bachelor's degree does not list a major field of study.

The record contains the following educational evaluations of the beneficiary's credentials:

- An April 21, 2011 evaluation from signed by The evaluator states that the beneficiary's Master of Science degree in applied electronics is "the foreign equivalent of a two-year Master of Science Degree in Electronic Engineering from an accredited U.S. college or university." In this evaluation, specifically lists the Electronic Database for Global Education (EDGE) as a reference. does not suggest that his evaluation contradicts EDGE.

- A February 24, 2012 evaluation from signed by The evaluator states that the beneficiary's Master of Science degree in applied electronics is "the equivalent of a Master of Science Degree in Electronics and Applied Physics." In this new evaluation expresses for the first time his concerns about some information in EDGE, much of it relating to countries other than India. In support of his evaluation, submits evidence of accelerated five-year combined bachelor/master programs at U.S. universities. At least one of these programs specifically states the need to supplement the academic year with summer courses. does not explain how India similarly accelerates its three-year bachelor degree programs such that they are equivalent to a U.S. bachelor's degree program. In addition, submits evidence of U.S. university entrance requirements for master's programs advising that those with foreign three-year degrees may apply. Nothing in this material suggests that these applicants would be admitted without qualification and without a requirement to supplement their degree with additional credits either prior to admission or during the master's course of study.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

The evaluations are not persuasive in establishing that the beneficiary's education from India is equivalent to a U.S. master's degree. Although the evaluations explain in detail the content of the beneficiary's two-year master's degree program, these reports fail to establish that the beneficiary's master's program following a three-year bachelor's degree program is a foreign equivalent degree to

a U.S. master's program following a four-year U.S. bachelor's degree.[1] Furthermore, the submitted evaluations conflict with each other. The evaluation dated April 21, 2011 concludes that the beneficiary holds the equivalent of a U.S. Master of Science degree in electronic engineering. However, the evaluation dated February 24, 2012 concludes that the beneficiary holds the equivalent of a U.S. Master of Science degree in electronics and applied physics. Moreover, [redacted] initially listed EDGE as a resource, while discounting it in his second evaluation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The AAO has reviewed EDGE, created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,600 institutions and agencies in the United States and in over 40 countries." *See* http://www.aacrao.org/About-AACRAO.aspx (accessed May 22, 2013 and incorporated into the record of proceeding). Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.* In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D. Minn. March 27, 2009), a federal district court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision.

According to the login page, EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. Dale E. Gough, Director of International Education Services, "AACRAO EDGE Login," http://aacraoedge.aacrao.org/index.php (accessed May 22, 2013 and incorporated into the record of proceeding). In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), a federal district court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc. v. USCIS*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), a federal district court upheld a USCIS conclusion that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience. *See also Viraj, LLC v. Holder,* No. 2:12-CV-00127-RWS (N.D. Georgia May 18, 2013).

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[1] The beneficiary's baccalaureate transcript is inconsistent, stating that the beneficiary completed a three-year program but only listing coursework for two academic years, 1998-1999 and 1999-2000.

In the section related to the Indian educational system, EDGE provides that a three-year Bachelor of Science degree "represents attainment of a level of education comparable to two to three years of university study in the United States. Credit may be awarded on a course-by-course basis." EDGE further states that the Master of Science "represents attainment of a level of education comparable to a bachelor's degree in the United States."

Based on the relevant, probative and credible evidence of record, including the juried opinion of EDGE, the beneficiary's Master of Science degree is comparable to a U.S. bachelor's degree. As the petitioner does not assert on appeal that the beneficiary has the necessary five years of progressive post-baccalaureate experience, the beneficiary does not qualify for the classification sought.

II. QUALIFICATIONS FOR JOB OFFERED

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be

expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The required education, training, experience, and special requirements for the offered position are set forth at Part H of the ETA Form 9089. Here, Part H shows that the position requires a master's degree, or foreign educational equivalent, in any engineering/electronics major and 36 months of experience in the job offered or any occupation providing the required skills and abilities. The petitioner will also accept a bachelor's degree and 5 years of work experience. However, as previously discussed, the director found that the beneficiary did not have 5 years of documented work experience as of the date of filing, and counsel does not contest this conclusion on appeal. Thus, the petitioner must establish that the beneficiary has a master's degree or foreign educational equivalence, in any engineering/electronics major. For the reasons discussed above, the petitioner has not established with relevant, probative and credible evidence that the beneficiary has a foreign equivalent degree to a U.S. master's degree.

Beyond the decision of the director, the regulation at 20 C.F.R. § 656.30(c)(2) states in pertinent part that "[a] permanent labor certification involving a specific job offer is valid only for…the area of intended employment stated on…the Application for Permanent Employment Certification." Part H, line 1, lists the primary worksite as [redacted] in Illinois. According to the petitioner's response to the director's January 19, 2012 RFE, the petitioner intends to employ the beneficiary at a location outside the area of intended employment, specifically at [redacted] in Atlanta, Georgia. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979) (change of area of intended employment renders a labor certification invalid). This issue remains unresolved.

Since the beneficiary holds a "United States baccalaureate degree or a foreign equivalent degree," not an advanced degree, and does not have the required five years of experience in the job offered, he does not qualify for preference visa classification under section 203(b)(2) of the Act. The beneficiary also does not meet the job requirements on the labor certification.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.